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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

FRANK STEVENS,
Respondent,

v.

R. A. NORTHWAY, Doing Business Under the Assumed Name of Northway Clinic and Hospital, R. A. NORTHWAY, ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Petitioner.

No. 425

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, WITH SUPPORTING BRIEF.

FREDERICK J. WARD,
1117 Dime Bank Building,
Detroit, Michigan.

H. MONROE STANTON,
Saginaw, Michigan,
ALAN W. BOYD,
130 E. Washington Street,
Indianapolis, Indiana.
Attorneys for Petitioner.

C. E. Pauley & Co., Inc., Indianapolis

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May it Please the Court:

The petition of The Metropolitan Casualty Insurance Company of New York respectfully presents to this Honorable Court:

I

Summary Statement of the Matter Involved

Prior to March 8, 1939, the respondent recovered a judgment against the principal defendants in the Isabella Circuit Court of the State of Michigan and on that date filed an affidavit for a writ of garnishment after judgment and obtained the issuance of such writ requiring the petitioner herein as garnishee defendant to appear on or before March 31, 1939, and file a disclosure in writing under oath concerning its liability as garnishee of the principal defendants. On March 28, 1939, petitioner pursuant to prior notice (R., p. 9) filed its petition to remove said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division. The petition alleged diversity of citizenship as between petitioner, a citizen of New York, and respondent, a citizen of Michigan, and the existence of a separable controversy as between them involving an amount in excess of jurisdictional requirements (R., pp. 10 to 12). A proper bond in due form was filed at the same time (R., p. 13). On April 10, 1939, a transcript was filed in the District Court of the United States for the Eastern District of Michigan, Northern Division, and a disclosure under oath was filed in said court by the petitioner, denying any indebtedness or liability to the principal defendants or respondent. The disclosure admitted the issuance to the principal defendant, R. A. Northway, of a liability policy covering malpractice and asserted that such policy did not cover any liability of Northway arising out of the operation of a clinic and consequently did not cover the liability on which the judgment against the principal defendants was based (R., p. 66). On April 11, 1939, subsequent to the filing of such transcript and disclosure, the state court denied the petition

for removal and entered an order defaulting petitioner on the ground of failure to appear and file its disclosure and referring said cause to the court for assessment of damages (R., p. 19). On April 15, 1939, the district court ordered the cause remanded, which order was filed in the state court on April 17, 1939, (Sunday having intervened) and on that date the state court entered a second order defaulting petitioner for failure to appear and file a disclosure (R., p. 27) and entered judgment on said default in the sum of $10,418.30 and costs (R., p. 54). On the following day, petitioner moved to set aside the default (R., p. 62), which motion was denied (R., p. 100). This action was affirmed on appeal to the Supreme Court of Michigan and this petition seeks a review of said judgment. The opinion is found in the record at pp. 187 to 189. It is reported in 291 N. W. 211.

II

Reasons Relied Upon for Allowance of the Writ

Petitioner's position may be summarized as follows: The garnishment proceeding commenced against petitioner after judgment against the principal defendants though ancillary in form was essentially a new and independent controversy between petitioner and respondent, and since all other elements essential for removal were present said cause was removable notwithstanding its form. The cause being removable was effectively removed by the filing of its petition and bond after notice, and the state court was thereby without jurisdiction thereafter until such jurisdiction was regained by the remand. The default entered in the meantime on April 11, 1939, was null and void and petitioner's disclosure filed in the district court on April 10, 1939, was filed in the only court having at the time

jurisdiction of the cause. Conceding that the state court regained jurisdiction by virtue of the remand, such order had no retroactive effect if the cause was one properly removable under the statutes of the United States pertinent thereto. (Title 28, Sect. 71, U. S. C. A., Jan. 20, 1914, c. 11; 38 Stat. 278.) At the time the default judgment was entered on April 17, 1939, for want of appearance and disclosure, petitioner had appeared and filed such disclosure in the only court having jurisdiction of the cause at the time thereof. The judgment of the trial court, the overruling of the motion to set aside the default, and the affirmance by the Supreme Court of Michigan failed and refused to accord legal effect to the disclosure so filed and thereby denied petitioner rights given by the statutes of the United States pertaining to the removal of causes. As a result petitioner was denied its day in court and thereby deprived of its property without due process of law in violation of Article 14 of the Articles in Amendment of the Constitution of the United States.

The motion to set aside the default judgment specified the removal of said cause to the District Court of the United States for the Eastern District of Michigan, Northern Division, by the filing of the petition and bond in the state court on March 28, 1939, the filing of the transcript in the federal court on April 10, 1939, the filing of the disclosure in said court and the service thereof upon respondent (R., pp. 62, 63). Said motion contained further the following specifications:

> 12. That at the time the default papers were filed herein, said cause of action had been transferred to the District Court of the United States, Eastern District of Michigan, Northern Division, and that this court had no jurisdiction over said action.

13. That the default filed herein was irregularly entered.

14. That the garnishee defendant herein did file a disclosure in the District Court of the United States, Eastern District of Michigan, Northern Division, on April 10, A. D. 1939, and a copy of said disclosure was served on the plaintiff herein, by mailing a true copy of same, postage fully prepaid, to the plaintiff's attorney, B. A. Wendrow, on April 14, A. D. 1939.

The Supreme Court of Michigan considered and decided the questions here specified in the opinion which is as follows:

OPINION

Decided April 1, 1940. Rehearing applied for.

Wiest, J., plaintiff, had judgment in the Isabella Circuit Court against the principal defendants in an action for malpractice and, on March 8, 1939, sued out in that court a writ of garnishment against the Metropolitan Casualty Insurance Company of New York, requiring disclosure on or before March 31, 1939. The writ was regularly served, as provided by law, upon the commissioner of insurance. March 28, 1939, the garnishee petitioned the Circuit Court for removal of the proceedings to the Federal District Court by reason of diversity of citizenship, tendered bond, and, upon denial of removal, the attorneys for the garnishee served notice of removal to the Federal Court. After such notice, and on April 10th, disclosure by the garnishee denying indebtedness or liability was filed in the Federal Court. The Federal Court on April 15, 1939, remanded the proceeding to the State Court. In the meantime plaintiff entered the default of the garnishee in the State Court for want of appearance and disclosure in that court and, upon remand by the Federal Court, re-entered the default on April 17th, and, the same

day, upon proofs, in court, took judgment against the garnishee. April 18, 1939, the garnishee, under special appearance, moved the Circuit Court to set aside the default as prematurely entered, averred filing of the disclosure in the Federal Court denying liability and notice thereof to the attorneys for plaintiff before entry of the default and filed an affidavit of merits. The motion was denied, and this appeal followed.

The garnishment proceeding was ancillary to the action against the principal defendants and wholly dependent thereon and not the commencement of a independent action. *Wyngarden v. LaHuis*, 251 Mich. 276.

The writ of garnishment was regular, proper service was made, and disclosure was required on or before March 31, 1939; and none was filed in the Circuit Court and not in the Federal Court until April 10th.

Attorneys for the garnishee contend that, under Court Rule No. 27, Sec. 3 (1933), time to file disclosure was extended 15 days from April 11th, when the petition for removal to the Federal Court was denied and, therefore, the default was premature.

That rule relates to pleadings in original actions and suits and not to proceedings in garnishment wholly regulated by specific statutory provisions. The point urged is without merit.

The writ of garnishment was served on the commissioner of insurance, as provided by statute, and mailed to the garnishee on March 10, 1939, giving 21 days in which to appear and make disclosure.

It is claimed that, under Court Rule No. 27, Sec. 5 (1933), the garnishee had 30 days after service on the commissioner of insurance in which to file disclosure.

The mentioned rule provides:

'Where service of process against corporations is made upon the commissioner of insurance or secretary of state, the defendant shall not be required to appear or answer thereto until thirty days after the mailing of the copy of such process to such defendant by said commissioner of insurance or secretary of state.'

If this rule is applicable to garnishments (a question we do not decide) it would not help the garnishee whose default, for want of appearance and disclosure, was entered on April 17th, or more than 30 days after the commissioner of insurance mailed the copy of the writ to the garnishee at its home office in New York City.

Considering the refusal of the Circuit Court to grant removal to the Federal Court and the remand by the Federal Court, the disclosure filed in the Federal Court was no compliance with the writ of garnishment.

In behalf of the garnishee it is claimed that the attorneys for plaintiff had a copy of the disclosure filed in the Federal Court and it was sharp practice to enter the default in the Circuit Court under such circumstances.

Counsel for plaintiff did no more than protect their client's rights, and it is not difficult to understand why they did not point out to opposing counsel their errors in the matter of their somewhat defiant attempt to remove the proceeding to the Federal Court.

The default and judgment thereunder were regular and there was no abuse of discretion on the part of the court in abiding by the law. That the garnishee has not had its day in court is not attributable to counsel for plaintiff.

The action of the Circuit Court is affirmed, with costs to plaintiff. (R., pp. 187 to 189.)

The contentions made here were each and all specified in the application for rehearing including the contention that the cause was removable regardless of its ancillary form; that jurisdiction of the state court was divested by the filing of the petition and bond; that the remand had no retroactive effect if the cause was in fact removable; that a disclosure was filed in the only court having jurisdiction at the time, prior to the default, and that the action of the trial court affirmed by the Supreme Court of Michigan denied petitioner its day in court and thereby deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (R., pp. 190 to 201). The following is an excerpt from the application for rehearing:

> "The questions as to the effect of the removal proceeding and the steps taken therein, involve wholly the construction of the Federal statutes pertaining thereto, and we submit that such Federal questions have been incorrectly decided by the trial court and by this court. We further submit that the judgment in this cause was affirmed by this court, has erroneously denied appellant its day in court, and thereby taken its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. In effect appellant has been denied an opportunity to be heard on the merits because it asserted in good faith that a right to remove the cause existed and took appropriate steps to attempt to establish its contention. If the cause was removable, appellant at all times took the only steps available in the only court where at the time they could be taken, and at the time it was defaulted had taken all steps, in a court which then had jurisdiction, necessary to have prevented a default, if taken in the state court."

The application for rehearing was seasonably filed, entertained and denied by the Supreme Court of Michigan on June 18, 1940 (R., p. 202).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Michigan, commanding that court to certify to this Court for its review and determination, on a day certain to be therein named, all proceedings in the case numbered and entitled on its docket No. 40692, Frank Stevens, plaintiff and appellee, v. R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher, principal defendants, The Metropolitan Casualty Insurance Company of New York, a foreign corporation, garnishee defendant and appellant, and that the judgment of the Supreme Court of the State of Michigan and of the Isabella Circuit Court of the State of Michigan, be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may be meet and just, and your petitioner will ever pray.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

By FREDERICK J. WARD,
H. MONROE STANTON,
ALAN W. BOYD,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the Supreme Court of the State of Michigan appears in the Record at pages 187 to 189. It is reported in 291 N. W. 211 and set out in full in the petition herein (pp. 5 to 7).

II

Jurisdiction

The date of the judgment of the Supreme Court of the State of Michigan was April 1, 1940 (R., p. 187). A petition for rehearing was seasonably filed and was denied June 18, 1940 (R., p. 202). The decision affirms the judgment of the trial court.

III

Statement of the Case.

All essentials necessary to a consideration of this petition are set out in the petition under the "Summary Statement" (Petition, p. 2).

IV

Assignments of Error

The assignments of error are set forth in the petition under the heading of "Reasons Relied On for Allowance of the Writ" (Petition, pp. 3 to 5).

V

Summary of Argument

The controversy between petitioner and respondent while in form an action of garnishment was in substance a new and independent controversy and as such removable to the Federal Court.

The cause was effectively removed and the State Court lost jurisdiction prior to the time petitioner was required to appear and answer in the State Court and was without jurisdiction at the time petitioner was defaulted. Such action was therefore void.

Jurisdiction was regained by the State Court by the remand but was not restored retroactively and the prior default was not rendered valid thereby. At the time of the remand petitioner had appeared in the court then having jurisdiction of the cause and filed its disclosure. Such action could not be treated by the State Court as a nullity even though the order of remand is final as to further proceedings in the Federal Court.

The policy of Congress in denying review of an order of remand is to avoid delay in the progress of the cause. Such purpose does not require that the interim proceedings be considered a nullity where the cause was in fact removable and where the result would be to penalize the assertion of a federal right.

ARGUMENT

I

The questions presented by petitioner depend initially on whether this cause was properly removable to the United States District Court and whether the proceedings in that court prior to remand have any force and effect. If it was not so removable the situation is merely one where the petitioner failed to take proper steps at the time required under the practice of the State of Michigan and was defaulted by reason of such failure. If, on the other hand, the cause was one which petitioner was entitled to remove and proper steps were taken to that end, it has been penalized by the State Court because it availed itself of a federal right given by the statutes of the United States pertaining to removal. Clearly all elements of removability were present unless removal was prevented by the fact that the proceeding was in garnishment and consequently ancillary in form.

While it is true that the action was in form ancillary, it is independent and original as far as petitioner and respondent were concerned. The question whether petitioner was bound to pay the judgment under its policy was not involved in the original action, and its essential nature was in no way altered because respondent elected to proceed under the garnishment statute instead of by an original action on the policy which he had the right to maintain. We have found no decision of this court decisive of this question and there has been a considerable divergency of view of the lower federal courts. The better-considered cases, however, uphold removability. The question was thoroughly considered in *Reed v. Bloom* (Maryland Casualty Company of Baltimore, Garnishee) (D. C., W. D. Okla. May 1, 1936), 15 F. Supp. 7, 8, from which we quote as follows:

"The plaintiff, Tom B. Reed, recovered a judgment against the defendant, Lloyd L. Bloom, in the District Court of Oklahoma County, Okla., on the 7th day of February, 1936, for injuries received in an automobile accident. After the rendition of said judgment, execution was issued against the defendant, Bloom; the execution being returned: 'No property found.' Thereafter garnishment proceedings were instituted against the garnishee, Maryland Casualty Company, a nonresident corporation, in aid of the execution, under Sections 500 and 501, O. S. 1931.

The garnishee answered said process, and within due time filed its petition to remove to this court. The plaintiff filed his motion to remand, and this matter comes on for hearing on the motion to remand.

It is the contention of the plaintiff that this action is so directly connected with the original suit as to be a part of the original suit, and that this proceeding is merely an action in aid of execution. The garnishee contends that the controversy between the plaintiff and the garnishee is in the nature of an independent action and is the same as a suit at law by the plaintiff against this garnishee.

There is no question in the court's mind but that the plaintiff has followed the procedure as provided in the Oklahoma statutes. *The question, however, to be determined is whether or not regardless of the name of the proceeding, the action is independent and is an original action insofar as this garnishee is concerned.*

It is admitted that the garnishee executed an indemnity policy in favor of the defendant in the original action, but its contention is that this policy does no cover the class of accidents in which the plaintiff was injured; that this question was not

involved in the original suit, but constitutes an independent suit. * * *

It is admitted that, had the plaintiff brought an original action against the garnishee on the insurance policy, such action would have been removable from the State Court to Federal Court. Clearly the only advantage that the plaintiff secured by virtue of his judgment against Bloom in the State Court, insofar as the garnishee in this action is concerned, was the right to be substituted for Bloom as the beneficiary under the indemnity policy. *The right to remove a cause to the Federal Court is controlled wholly by federal statutes;* it being admitted that a state cannot enact a law which would affect the rights of a nonresident under the Constitution and the laws of the United States.

In *Terral v. Burke Construction Company,* 257 U. S. 529, 48 S. Ct. 188, 189, 66 L. Ed. 352, 21 A. L. R. 186, the court, in discussing the right of a nonresident citizen to remove a cause to the federal court under the terms of the federal statute, said: 'It rests on the ground that the federal constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.'

In *Donald v. Philadelphia & Reading Coal Company,* 241 U. S. 329, 36 S. Ct. 563, 564, 60 L. Ed. 1027, quoting from *Harrison v. St. Louis & San Francisco R. Company,* 232 U. S. 318, 34 S. Ct. 333, 58 L. Ed. 621, L. R. A. 1915 F., 1187, the court said: 'The judicial power of the United States as created the Constitution and provided for by Congress pur-

suant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.'

In defining a 'suit,' in *Weston v. City Council of Charleston*, 2 Pet. 449, 464, 7 L. Ed. 481, Chief Justice Marshall said: 'The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass.'

In *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 5 S. Ct. 1113, 1124, 29 L. Ed. 319, the court, in considering certain issues which arose between a nonresident corporation in connection with other interested parties in an action pending in a state court said: 'The proceedings for widening the street, pending in the state court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company, although it might raise a question of proper parties in a pure chancery proceeding as between the city and the company. This controversy is to all intents and purposes "a suit." The indirect effect upon the general proceedings for widening the street which would ensue in case the Federal Court should determine that the city of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its

property was much too small, or the assessment of benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the act of March 3, 1875.'

In a much more recent case, *Commissioners of Road Imp. District v. St. Louis Southwestern R. Company,* 257 U. S. 547, 42 S. Ct. 250, 255, 66 L. Ed. 364, the court, in response to the contention that the proceeding could not be removed because the statutory proceedings could not have been originally instituted in the Federal Court, said: 'This limitation is not intended to exclude from the right of removal defendants in cases in the Stat Court which, because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure. *Sheffield Furnace Company v. Witherow,* 149 U. S. 574, 579, 13 S. Ct. 936, 37 L. Ed. 853; *Fleitas v. Richardson,* 'No. 1, 147 U. S. 538, 544, 13 S. Ct. 429, 37 L. Ed. 272. The limitation is that only those proceedings can be removed which have the same essentials as original suits permissible in district courts; that is that they can be readily assimilated to suits at common law or equity, and that there must be diverse citizenship of the parties and the requisite pecuniary amount involved.'

In *Smith v. Adams,* 130 U. S. 167, 9 S. Ct. 566, 568, 32 L. Ed. 895, the court said: 'Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case of controversy.'

In *Schuler v. Israel,* 120 U. S. 506, 7 S. Ct. 648, 650, 30 L. Ed. 707, it is said: 'As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending

himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account.'

In *McLaughlin v. Swann,* 18 How. 217, 229, 15 L. Ed. 357, the court said: 'But in a state where the legal and equitable jurisdictions are distinct, and in a court of the United States, having full equity powers, we consider that a garnishee should stand as nearly as possible in the same position he would have occupied if sued at law by his creditor.'

* * *

In *Davis v. Lilly,* 17 Okla. 579, 87 P. 302, 303, the Oklahoma Supreme Court, in discussing a suit in which the garnishee was made a party in the original action, said: 'In an action of this kind two distinct and different issues are presented. One between the plaintiff and defendant, and the other between the plaintiff and the garnishee.'

In *Tunstall v. Worthington,* Federal Case No. 14,239, in discussing the character of a garnishment proceeding, it was said: 'It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process.'

In *Ward v. Congress Construction Company* (C. C. A., 7th Circuit), 99 F. 598, 602, in a suit in equity in a state court enjoining the erection of buildings on certain grounds, a motion was filed by the complainant for an order restraining a third person, who was not a party to the suit, from violating the decree. The third party, being a nonresident of the state, filed a petition and bond for removal of the case to the Federal Court. It was contended that the proceeding was ancillary to the original action and was not an independent suit which could be removed. The court said: '*But a*

party thus brought in, who was in no way bound by the original decree, it is evident, must be deemed to have the same right to ask a removal as if he had been made a party at first; and, indeed, a better right, since there can arise no questions of the separability of his interests from those of the original defendants.'

The court in its opinion further said: 'While the proceeding now in question evidently was intended to be auxiliary to the decree of the State Court, and was so in form, yet in fact, *ratione materiae,* it was not of that character.'

The plaintiff in this action relies largely upon an opinion by Judge Kennamer of the Northern District of Oklahoma, *Lahman v. Supernew et al.* (Indemnity Ins. Company of North America, Garnishee) (D. C.), 47 F. (2d) 610, decided February 10, 1931, in which Judge Kennamer held that a garnishment proceeding, such as has been instituted by the plaintiff, was not an independent action, but was a proceeding in aid of execution. Much as I respect the judgment of my learned friend Judge Kennamer, I cannot agree with his conclusions in that case. He also cites a case from the Eastern District of Missouri by District Judge Davis, *Brucker v. Georgia Casualty Company* (D. C.), 14 F. (2d) 688. I have read this opinion very carefully and, while there is a difference between the Oklahoma statutes and the Missouri statutes, I cannot follow the conclusions reached in that case.

The mere fact that the plaintiff in this case preferred to bring a garnishment proceeding against the garnishee in this case, instead of filing an independent suit against the garnishee does not change the position of the garnishee as to its rights to remove the cause to the Federal Court.' * * *

This court is not inclined to increase the business of the Federal Court in this district, but an

> emergency arising from an over-crowded docket is not sufficient to justify a denial of the constitutional right of the garnishee. The motion to remand will be overruled and an exception allowed."

The following decisions of the judge of the Northern District of Oklahoma are in conflict with this view:

> *Lahman v. Supernaw et al.* (D. C. N. D. Okla., 1931), 47 F. (2d) 610;
> *Lawley v. Whiteis,* 24 F. Supp. 698.

The question is set at rest in the Tenth Circuit however, in *London & Lancashire Indemnity Co. v. Courtney* (C. C. A. 10, July 31, 1939), 106 F. (2d) 277, 283, where it was said:

> "With diversity of citizenship and other jurisdictional facts existing, the right of the defendant to remove such suits into the Federal Court exists. See *Barrow v. Hunton,* 99 U. S. 80, 85, 25 L. Ed. 407; *Gaines v. Fuentes,* 92 U. S. 10, 2 Otto 10, 23 L. Ed. 524; *Bondurant v. Watson,* 103 U. S. 278, 281, 26 L. Ed. 447; *Lackawanna Coal & Iron Co. v. Bates,* C. C., 56 F. 737 (opinion by late District Judge John F. Phillips); *Reed v. Bloom,* D. C., 15 F. Supp. 7; *Old Dominion Oil Co. v. Superior Oil Corp.,* D. C., 283 F. 636; *Chicago M. & St. P. R. Co. v. Spencer,* D. C., 283 F. 824; *Pacific Railroad Removal Cases,* 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319; *Commissioners of Road Imp. Dist. v. St. Louis, Southwestern R. Co.,* 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364; *Mississippi & R. River Boom Co. v. Patterson,* 98 U. S. 403, 25 L. Ed. 206; *Madisonville Traction Co. v. St. Bernard Mining Co.,* 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462; *Parker v. Overman,* 18 How. 137, 15 L. Ed. 318; *Searl v. School Dist.,* 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; *In re Stutsman County,* C. C., 88 F. 337; *Colo-*

rado Midland R. Co. v. Jones, C. C., 29 F. 193, and cases cited *In re Palmer's Will,* D. C., 11 F. Supp. 301. * * *

In the instant case the defendant garnishee's controversy with the plaintiff, Lucille A. Courtney, is wholly separable from the issues involved on which the judgment against R. G. Courtney in favor of Lucile A. Courtney is founded. The only question to be litigated in the civil action wherein the garnishee, London & Lancashire Indemnity Company of America, is defendant and Lucile A. Courtney, plaintiff, is as to whether said garnishee was indebted to said defendant, R. G. Courtney.

The affidavit for writ of garnishment takes the place of a petition. The defendant garnishee is brought into court on process, and his answer as garnishee constitutes his answer in that action. The object of the proceedings is to have the court adjudge whether the defendant's property shall be rendered liable to plaintiff in the amount of the judgment. On this issue he would be entitled to a trial in due form of law with right of appeal and review on writ of certiorari."

Toney v. Maryland Casualty Co. et al. (D. C. W. D. Va.), 29 F. Supp. 785, also denies the right of removal and cites in support of the ruling, *American Automobile Ins. Co. v. Freundt* (C. C. A. 7, 1939), 103 F. (2d) 613. The question involved there was whether an insurer who was a defendant in a garnishment proceeding pending in a state could maintain an action in the Federal Court for a declaration of rights as to the issues involved in the State Court proceeding. It was held that the Federal Court had the discretionary right to refuse to entertain the action and suggested as one reason for the holding, the nonremovability of an ancillary action. None of the foregoing de-

cisions are cited and the question involved here clearly was not considered with any degree of thoroughness. We submit that the authorities holding the cause removable where it involves an essentially independent controversy are sound and reach a correct result.

The Michigan statute under which this proceeding was commenced is set out in the appendix hereto. It provides that the affidavit for the writ shall be held and considered as a declaration by the plaintiff against the garnishee defendant and sets out the method affirming the issues for the trial of the question of the garnishee's liability. The right to a trial by jury if requested is specifically included. In substance this cause was an independent controversy and removable as such.

II

The filing of a proper petition for removal and bond after notice and within the proper time, divests a state court of jurisdiction to proceed further regardless of whether any order is made by the State Court. The rule has been recently stated as follows in *Morgan v. Kroger Grocery and Baking Company* (C. C. A. 8), 96 Fed. (2d) 470, 472:

> "Ordinarily, the filing of a proper petition and bond for removal deprives the State Court of jurisdiction and confers jurisdiction upon the Federal Court. *Kingston v. American Car & Foundry Company,* 8 Cir., 55 F. (2d) 132; *Janoske v. Porter,* 7 Cir., 64 F. (2d) 958. The fact that the State Court declined to sign the order of removal, or the fact that it signed an order denying the petition for removal, would not affect the jurisdiction of the Federal Court if, in fact, the cause were removable."

While jurisdiction in the State Court may be regained as a result of remand, the jurisdiction in the meantime, if as we contend the cause was in fact removable, would necessarily be in the Federal Court alone. It necessarily follows that any action in the State Court during the interim, would be of no force and effect. Many authorities are cited in 54 Corpus Juris 343, to the following statement:

> "Where a right to remove a cause from a State Court to a Federal Court exists, and a removal is properly effectuated, the State Court is thereby divested of jurisdiction; and it has no power to proceed further, save to enter an order of removal, *unless and until the cause is thereafter remanded by the Federal Court. Pending any such remand, therefore,* or if the cause is not remanded, any further proceedings had or orders made there by such State Court are not merely erroneous, but *coram non judice* and absolutely void."

In *Bishop & Babcock Sales Company of Ohio v. Lackman* (Tex. C. A.), 4 S. W. (2d) 109, it was held that where a cause has been removed to the Federal Court even though thereafter remanded, the State Court has no jurisdiction in the meantime, and that the time when defendant would otherwise be required to answer is extended until after the remand. The court said:

> "After the suit was removed to the Federal Court and during its pendency in that court, the State Court had no jurisdiction of it and the defendant was not required to file an answer in that court even to the merits of the case. The citation issued in the State Court required the defendant to appear at the October term, and since the case was not in that court during that term, necessarily the defendant was not required to answer *until after*

> *the remand of the case to that court.* After the case was remanded the first appearance term of the State Court was the May term, and prior to the beginning of that term the plea of privilege was filed. It would be unreasonable to hold that an answer to the merits and a cross-action filed by the defendant in the Federal Court would be a waiver of the right to file a plea of privilege in the State Court later."

It follows that if the cause was removable, the default entered on April 11th, 1939, at a time when the cause was still pending in the District Court, was wholly void and could not constitute a basis for a later judgment rendered thereon. While there is little authority dealing with the question of whether a remand restores jurisdiction retroactively, there is at least some substantial authority that it does not. In *Roberts v. C., St. P., M. & O. Ry. Company* (Minn.), 51 N. W. 478, a petition for removal to the Federal Court was filed in the clerk's office but not presented to the court. A certified copy of the record was then obtained and filed in the Federal Court, but this was not called to the attention of the judge. The defendant was defaulted and later attempted to have the default set aside. In the meantime the Federal Court remanded the cause. While the court refused to set aside the default for the reason that it considered the mere filing with the clerk insufficient to remove the cause, it plainly recognized that had the petition been properly presented, the remand would have no retroactive effect in bolstering the court's want of jurisdiction in the interim. The court there said:

> "Nor can it affect the validity of the judgment that the case was subsequently remanded to the State Court, it being considered by the Circuit Court that the attempted removal had not been effectual. Of course, that decision of the Circuit Court is to be regarded as authority upon the question whether

the proceedings for removal were effectual; *but the remanding of the cause had no retroactive effect as respects the jurisdiction of the State Court prior thereto.*"

III

If in fact the cause was a removable one, the State Court lost jurisdiction prior to March 31, 1939, and the appellant on April 10, 1939, filed in a court then having exclusive jurisdiction of the parties and subject matter, its appearance and disclosure. The State Court had not regained jurisdiction by remand at that time. The Federal Court had not yet relinquished it by remand. At the time the State Court regained jurisdiction, and immediately proceeded to enter a default judgment, the disclosure had been actually filed in a court having at the time, exclusive jurisdiction, being in fact the only court where any valid step could then be taken. The order of remand does not specify want of jurisdiction as a ground (R., p. 21). Undoubtedly the remand even though erroneous terminated any right to litigate the matter further in the Federal Court although it has been held that such an order can be reviewed if not based on jurisdictional grounds. *Bankers Securities Corp. v. Insurance Equities Corp.* (C. C. A. 3, 1936), 85 F. (2d) 856. The policy of Congress in denying a review of an order remanding a cause has been many times declared to be grounded on the delay which would ensue if an appeal from the order had to be disposed of before the cause could proceed further. *Ex parte Bopst* (C. C. A. 4, 1938), 95 F. (2d) 828. This purpose could be in no way defeated by recognizing in subsequent litigation the validity of proceedings in the Federal Court prior to remand where the cause as here is obviously removable, so that a litigant would not be penalized by denial of an opportunity to present his

cause on the merits, for asserting a right given by Federal statute. Any other result deprives him of his property without due process of law.

It is submitted that the petition presents a subject matter which should be determined by a decision of this court.

Respectfully submitted,

FREDERICK J. WARD,
H. MONROE STANTON,
ALAN W. BOYD,
Attorneys for Petitioner.

APPENDIX

AFFIDAVIT AS DECLARATION AGAINST GARNISHEE; ADMISSION; FRAMING OF ISSUE; JUDGMENT; DEMAND FOR TRIAL. Sec. 11. The affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff against the garnishee as defendant; and upon the filing of the garnishee disclosure, or upon filings of the answers to such written interrogatories, in cases where the same are required and filed, or upon the filing of the report of the testimony or statement made by such garnishee on such personal examination in cases where such examination is had, the matter of such affidavit shall be considered as denied except so far as the same is admitted by such disclosure, answers to interrogatories or report, which admission shall have the effect of admissions in a plea, and also shall be prima facie evidence of the matters therein admitted. And thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff. And judgment may be rendered against such garnishee defendant, as upon declaration and plea, or on plaintiff's motion to the court at any time after final judgment against the defendant in the principal cause, without further notice to such garnishee: PROVIDED HOWEVER, If such plaintiff or such garnishee defendant shall within ten (10) days after filing of such disclosure, answer or statement, file with the clerk of such court a demand for trial of the cause, said cause shall stand for trial in the manner provided by this act. A jury may be had on demand of either party. The time for filing said demand may be extended by the court upon application and showing.

Michigan C. L. 1929, Sec. 14867, Mich. Stat. Ann., Section 27.1865.

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